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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/215,049	08/22/2011	Robert L. Peterson	TAL 3879.0007	1458

152 7590 01/24/2017
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EXAMINER

ARYANPOUR, MITRA

ART UNIT	PAPER NUMBER
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3711

MAIL DATE	DELIVERY MODE
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01/24/2017

PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ROBERT L. PETERSON and
ROBERT JAMES UNDRILL

Appeal 2014-009654
Application 13/215,049
Technology Center 3700

Before CHARLES N. GREENHUT, MICHELLE R. OSINSKI, and
ANNETTE R. REIMERS, *Administrative Patent Judges*.

OSINSKI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Robert L. Peterson and Robert James Undrill (Appellants)¹ appeal under 35 U.S.C. § 134 from the Examiner's final decision rejecting claims 1–15. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

¹ According to Appellants, the real party in interest is Allied Power Products, Inc. Appeal Br. 2.

THE CLAIMED SUBJECT MATTER

Claims 1, 8, 10, 14, and 15 are independent. Claim 1, reproduced below, is illustrative of the claimed subject matter on appeal.

1. A mobile practice dummy comprising:
 - (a) a self-propelled base; and
 - (b) an upper body simulating a portion of a human body and adapted to be supported and movable by the base, the upper body securable to the base to avoid detachment when at least one of a speed and a direction of the base changes but detachable from the base when engaged by a person exerting a force to change a position of the upper body.

EVIDENCE

The Examiner relied on the following evidence in rejecting the claims on appeal:

Brown	US 2,757,482	Aug. 7, 1956
Feather	US 3,379,441	Apr. 23, 1968
Pin-Houn Lin	GB 2 027 349 A	Feb. 20, 1980
Williams	US 4,519,787	May 28, 1985
Szoke	US 5,713,783	Feb. 3, 1998
Getchell	US 6,796,915 B2	Sept. 28, 2004
Rios	US 7,357,760 B1	Apr. 15, 2008
Ungari	US 2010/0035724 A1	Feb. 11, 2010
Hartigan	WO 2010/122540 A2	Oct. 28, 2010

REJECTIONS²

- I. Claims 1–3 stand rejected under 35 U.S.C. § 102(b) as anticipated by Brown. Final Act. 11.
- II. Claims 4–13 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Brown and Szoke. *Id.* at 12–14.

² The rejections of: (i) claims 1–13 under 35 U.S.C. § 112(a) or 35 U.S.C. § 112 (pre-AIA), first paragraph, as failing to comply with the written

- III. Claims 1–4, 8, 10, and 11 stand rejected under 35 U.S.C. § 102(b) as anticipated by Williams. *Id.* at 15–16.
- IV. Claims 1–4 and 8–11 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Williams. *Id.*
- V. Claims 1–4, 8, 10, 11, 14, and 15 stand rejected under pre-AIA 35 U.S.C. § 102(e) as anticipated by Hartigan. *Id.* at 17–22.
- VI. Claim 5 stands rejected under pre-AIA 35 U.S.C. § 103(a) as unpatentable over Hartigan and one of Rios and Getchell. *Id.* at 22–23.
- VII. Claims 6 and 7 stand rejected under pre-AIA 35 U.S.C. § 103(a) as unpatentable over Hartigan and one of Ungari, Feather, and Pin-Houn Lin. *Id.* at 23–24.
- VIII. Claims 9, 12, and 13 stand rejected under pre-AIA 35 U.S.C. § 103(a) as unpatentable over Hartigan and Rios. *Id.* at 25–26.

OPINION

Rejection I

The Examiner finds that Brown discloses all of the limitations of independent claim 1, including, *inter alia*, a self-propelled base (carriage structure 10) and an upper body (a plurality of elements including driver 16) securable to the base to avoid detachment during speed and direction changes, but detachable when contacted by another object. Final Act. 11 (citing Brown, 1:70–71, 4:51–60).

description requirement; (ii) claims 1–3 under 35 U.S.C. § 102(b) as anticipated by Salosky (US 2,803,920, iss. Aug. 27, 1957); and (iii) claims 4–13 under 35 U.S.C. § 103(a) as unpatentable over Salosky and Szoke (Final Act. 2–10) have been withdrawn and are not before us on appeal. Ans. 3.

Appellants argue that Brown's carriage structure 10 is not self-propelled because it "require[es] an external energy source, typically a child, to energize a friction motor of the power unit 22 by pushing the toy over a surface." Appeal Br. 12 (citing Brown, 4:23–25). The Examiner responds that carriage 10 includes power unit 22 which "can be a friction motor actuated by rotating the wheels (17, 18)." Ans. 31. The Examiner explains that the child pushing the toy to activate the power unit "is not any different than [A]ppellant[s'] use of a remote control" to activate the propulsion unit. *Id.* Appellants reply that there is a "difference between providing a control for a means of propulsion and providing a means of propulsion." Reply Br. 2.

We agree with the Examiner that carriage 10 is self-propelled in that it contains within itself the means for its own propulsion, namely, wheels 17, 18 and power unit 22. We also agree with the Examiner that this is not negated by the fact that power unit 22 is typically actuated by a child initially pushing the toy in order to start rotation of wheels 17, 18. More particularly, we agree with the Examiner that actuation by wheel rotation is akin to actuation by a remote control.

Appellants also argue that driver 16 is not detachable from the base when engaged by a person exerting a force to change a position of driver 16 because "the fender units and the top unit shield the driver figure from engagement by a person attempting to exert force to move the driver figure" and because driver 16 is "not detachable until the front bumper is displaced by contact with another object (col. 4: line(s) 51–60) changing the speed and/or direction of the carriage structure which releases a second latch enabling springs 25 to eject the body parts (col. 2: line(s) 22–24)." Appeal

Br. 12. The Examiner responds that “[t]he claims do not require the upper body to be directly impacted in order to be displaced.” Ans. 32–33. We agree with the Examiner that nothing in the claims requires the upper body to be detachable from the base only by direct contact with the upper body, and that driver 16 is detachable from the base (even despite its shielding parts) when engaged by a person exerting a force to change a position of driver 16 (such as by causing the car to sustain an impact), and that this is sufficient to meet the language of the claim.

For the foregoing reasons, we sustain the rejection of independent claim 1 under 35 U.S.C. § 102(b) as anticipated by Brown. We also sustain the rejection of claims 2 and 3 which depend therefrom and for which Appellants present no new arguments or reasoning beyond that which we found unpersuasive in connection with the independent claim. *See* Appeal Br. 12.

Rejection II

The Examiner acknowledges that Brown does not disclose “using compl[e]mentary hook-and-loop material” as required by the dependent claims. Final Act. 12. The Examiner turns to Szoke for teaching that “detachable components [in a toy crash vehicle] can be held together using . . . VELCRO” and concludes that it would have been obvious to “substitut[e] one known fastener with another to achieve the predictable result of detachably connecting portions of a vehicle which jar loose from the vehicle as a result of impact.” *Id.*

Appellants argue that Brown and Szoke are non-analogous art because they are not “in the field of endeavor of a mobile practice dummy . . . nor pertinent to the problem of providing a mobile user engageable resilient

body supported by a self-propelled base and intended to simulate a live player during training for activities involving physical contact, such as tackling or blocking, by an opposing player.” Appeal Br. 13. The Examiner responds that Appellants define the problem being addressed more narrowly than justified by the claim. Ans. 34.

The established precedent of our reviewing Court sets up a twofold test for determining whether art is analogous: “[‘] (1) whether the art is from the same field of endeavor, regardless of the problem addressed and, (2) if the reference is not within the field of the inventor’s endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved.” *In re Klein*, 647 F.3d 1343, 1348 (Fed. Cir. 2011) (quoting *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004)).

One problem with which Appellants were involved is releasably securing an upper body to a mobile base unit to allow the upper body to change speed and direction rapidly without separating the upper body from the base unit, but also allowing separation of the upper body and the base unit under certain other conditions when desirable. *See* Ans. 34; Spec. ¶ 16. Brown similarly teaches selectively securing and separating an upper body (e.g., the plurality of elements including driver 16) from a mobile base unit (carriage structure 10). *See* Ans. 34; Brown, 4:51–60. Szoke similarly teaches fasteners for selectively securing and releasing interchangeable body panels support 10 from chassis 2. *See* Ans. 34; Szoke, Abstr., 4:17–18, Accordingly, we agree with the Examiner that the teachings of Brown and Szoke are reasonably pertinent to a particular problem with which the inventor was involved. Ans. 34.

Appellants also argue that one of ordinary skill in the art would not be led to substitute Brown's fastener with Szoke's hoop and loop fastener because it would "change the principle of operation of Brown's car" and Brown teaches away therefrom. Appeal Br. 13. Appellants maintain that Brown desires "locking the upper body parts to the carriage in order to 'enable the car to be manipulated safely'" (Reply Br. 4 (citing Brown, 3:13–17)) and suggests that a hook and loop fastener would not be able sufficiently to carry out that purpose (*id.* at 4–5).

The "principle of operation" referred to by Appellants relates to the "basic principles" under which the prior art device was designed to operate. *In re Ratti*, 270 F.2d 810, 813 (CCPA 1959) ("This suggested combination of references would require a substantial reconstruction and redesign of the elements shown in [the primary reference] as well as a change in the *basic principles* under which the [primary reference] construction was designed to operate.") (emphasis added). Under *Ratti*, "a change in the basic principles" refers to change that is fundamental in scope so as to relate to scientific or technical principles under which the invention is designed to operate. We are not persuaded that a "change in basic principles" occurs by substituting Brown's fastener with Szoke's hook and loop fastener as a hook and loop fastener continues to function as a fastener.

As to Appellants' teach away argument, "[a] reference may be said to teach away when a person of ordinary skill, upon reading the reference . . . would be led in a direction divergent from the path that was taken by the applicant." *In re Haruna*, 249 F.3d 1327, 1335 (Fed. Cir. 2001) (quoting *Tec Air, Inc. v. Denso Mfg. Mich., Inc.*, 192 F.3d 1353, 1360 (Fed. Cir. 1999)). In order to "teach away," a reference must "criticize, discredit, or

otherwise discourage the solution claimed.” *In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004)). Appellants have not sufficiently identified where Brown criticizes or discourages the use of a different fastener.

Although Appellants present “further reasons” as to why the rejection of dependent claims 5–7, 12, and 13, in particular, should be reversed, the additional reasoning amounts to a recitation of the claim elements and a “naked assertion” that the elements are not in the prior art. *See* Appeal Br. 14. Such reasoning is not persuasive. *See* 37 C.F.R. § 41.37(c)(1)(iv); *In re Lovin*, 652 F.3d 1349, 1357 Fed. Cir. 2011) (holding that the Board had reasonably interpreted the same language in the prior rule under 37 C.F.R. § 41.37(c)(1)(vii) as requiring “more substantive arguments in an appeal brief than a mere recitation of the claim elements and a naked assertion that the corresponding elements were not found in the prior art.”).

For the foregoing reasons, we sustain the rejection of claims 4–13 under 35 U.S.C. § 103(a) as unpatentable over Brown and Szoke.

Rejection III

The Examiner finds that Williams discloses all of the limitations of independent claim 1, including, *inter alia*, a self-propelled base (“column 40 which rests on enclosure 21”) and an upper body (“doll figure 203”) securable to the base to avoid detachment during speed and direction changes, but detachable when contacted by another object. Ans. 12–13; Final Act. 15. The Examiner takes the position that the combination of elements 21 and 40 of Williams are a “self-propelled” base because they “provide[] mobility to the assembly” and Appellants “ha[ve] not claimed a particular type of movement or motion.” Ans. 39–40. The Examiner finds in particular that “[e]nclosure 21 houses a portion of the propulsion

mechanism and support column 40 houses the other portion of the propulsion mechanism.” *Id.* at 40.

Appellants argue that Williams fails to disclose a self-propelled base in that “neither the housing 21 nor the column 40 contains within itself the means for its own movement, much less a means for its own propulsion.” Reply Br. 5. We agree with Appellants in that the Examiner has not adequately explained how housing 21 or column 40 contains a means for propulsion, when considering that “propulsion” relates to the action of driving or pushing forward. Rather than driving or pushing forward, Williams teaches motors 101, 102 that impart rotary motion to pinion wheel 48 and pinion wheel 74, respectively. Williams, 3:17–22, 25–29. The rotary motion of pinion wheel 48 is imparted to vertical support column 40. *Id.* at 3:23–24. It is unclear how the rotary motion imparted to vertical support column 40 constitutes “propulsion” originating from support column 40 itself. The rotary motion of pinion wheel 74 has a “vertical reciprocal component, which will be imparted to the miniature animal body, by virtue of the linkage assemblie[s] 50 and 70, to produce the simulated ‘bucking’ action of the device.” *Id.* at 3: 29–32 (emphasis omitted). Again, it is unclear how the vertical component of the rotary motion imparted to the assembly of Williams renders the column (the “base” as the Examiner has interpreted claims 1 and 10) or the propulsion unit (claim 8) themselves “self-propelled.” Moreover, linkages 50 and 70 are not contained within housing 21 nor column 40.

For the foregoing reasons, we do not sustain the rejection of independent claims 1, 8, and 10 under 35 U.S.C. § 102(b) as anticipated by

Williams. We also do not sustain the rejection of claims 2–4 and 11, which depend therefrom.

Rejection IV

The Examiner alternatively rejects claims 1–4, 8, 10, and 11 under 35 U.S.C. § 103(a) as obvious over Williams. Final Act. 15. The Examiner takes the position that to the extent Williams is not considered to inherently include means for adjusting speed and/or direction, it would be “obvious to incorporate in the device in order to simulate an actual bull.” *Id.* The Examiner also rejects claim 9 under 35 U.S.C. § 103(a) as obvious over Williams. *Id.* at 16–17. The Examiner acknowledges that Williams “does not expressly disclose the particular means for securing propulsion unit to the cover,” but concludes it would be obvious to use old and well-known means of securement “in order to provide a permanent or semi-permanent attachment between two elements.” *Id.* at 16.

The rejection of these claims relies on the Examiner’s erroneous findings as to Williams disclosing a self-propelled base. Final Act. 15–17. The Examiner does not explain how it might have been obvious to provide Williams with a self-propelled base. Accordingly, we do not sustain the rejection of claims 1–4 and 8–11 under 35 U.S.C. § 103(a) as unpatentable over Williams.

Rejection V

The Examiner finds that Hartigan discloses all of the limitations of independent claims 1, 10, and 14, including, *inter alia*, a self-propelled base (sled 4). Final Act. 17, 19, 20. With respect to independent claims 8 and 15, the Examiner finds that Hartigan’s “ground engaging inflatable ring 21 which is part of base or sled 4” is the claimed propulsion unit arranged for

self-propelled movement. *Id.* at 18; *see also id.* at 21. The Examiner’s position is based on an interpretation of “self-propelled” as “mounted on or fired from a moving vehicle” where “[t]he moving vehicle can be mechanical, electrical[,] or a person propelling the object.” Ans. 44–45. The Examiner finds that Hartigan’s sled “can be pulled by a person or any motive means, whether it be a human or a prime mover,” and as such, meets the claim under a broadest reasonable interpretation. *Id.* at 45.

Appellants argue that the alternative interpretation for “self-propelled” as “containing within itself the means for its own propulsion” “is the definition most consistent with the [Appellants’] use of the term in describing the mobile practice dummy having a self-propelled base comprising a propulsion unit including ground engaging elements, a motor(s) to power the ground engaging elements and energy storage to provide power to the motor.” Reply Br. 2 (citing Spec. ¶¶ 11–12).

When read in light of the Specification, we determine that it is unreasonable to interpret the term “self-propelled” to mean “mounted on a moving vehicle” as the Examiner proposes. This is because in the context of the Specification, the term “self-propelled” relates to a base unit that includes elements designed to enable the base unit to propel itself (Spec. ¶¶ 11–12) and is contrasted with sled mounted dummies that can be moved by members of the coaching staff (*id.* ¶ 3). The Examiner’s finding that Hartigan discloses a self-propelled base and/or a propulsion unit arranged for self-propelled movement as recited in independent claims 1, 8, 10, 14, and 15 is not adequately supported by the reference when the term is given its broadest *reasonable* interpretation.

For the foregoing reasons, we are persuaded that the Examiner erred in finding that Hartigan discloses all of the limitations of independent claims 1, 8, 10, 14, and 15, and we do not sustain the rejection of claims 1, 8, 10, 14, and 15 under 35 U.S.C. § 102(e) as anticipated by Hartigan. We also do not sustain, under 35 U.S.C. § 102(e), the rejection of claims 2–4 and 11, which depend therefrom, as anticipated by Hartigan.

Rejections VI, VII, and VIII

Claim 5 stands rejected under pre-AIA 35 U.S.C. § 103(a) as unpatentable over Hartigan and one of Rios and Getchell. Final Act. 22–23. Claims 6 and 7 stand rejected under pre-AIA 35 U.S.C. § 103(a) as unpatentable over Hartigan and one of Ungari, Feather, and Pin-Houn Lin. *Id.* at 23–24. Claims 9, 12, and 13 stand rejected under pre-AIA 35 U.S.C. § 103(a) as unpatentable over Hartigan and Rios. *Id.* at 25–26. Claims 5–7 depend, directly or indirectly, from independent claim 1. Appeal Br. 19–20 (Claims App.). Claim 9 depends directly from independent claim 8, and claims 12 and 13 depend, directly or indirectly, from independent claim 10. *Id.* at 21–22 (Claims App.).

The rejection of these claims relies on the Examiner’s erroneous findings as to Hartigan disclosing a self-propelled base and/or a propulsion unit arranged for self-propelled movement. Final Act. 22–26. The Examiner does not explain how Rios, Getchell, Ungari, Feather, and/or Pin-Houn Lin might cure this underlying deficiency. Accordingly, we do not sustain the rejections, under 35 U.S.C. § 103(a), of: claim 5 as unpatentable over Hartigan and one of Rios and Getchell; claims 6 and 7 as unpatentable over Hartigan and one of Ungari, Feather, and Pin-Houn Lin; and claims 9, 12, and 13 as unpatentable over Hartigan and Rios.

DECISION

The Examiner's decision to reject claims 1–3 under 35 U.S.C. § 102(b) as anticipated by Brown is affirmed.

The Examiner's decision to reject claims 4–13 under 35 U.S.C. § 103(a) as unpatentable over Brown and Szoke is affirmed.

The Examiner's decision to reject claims 1–4, 8, 10, and 11 under 35 U.S.C. § 102(b) as anticipated Williams is reversed.

The Examiner's decision to reject claims 1–4 and 8–11 under 35 U.S.C. § 103(a) as unpatentable over Williams is reversed.

The Examiner's decision to reject claims 1–4, 8, 10, 11, 14, and 15 under 35 U.S.C. § 102(e) as anticipated by Hartigan is reversed.

The Examiner's decision to reject claim 5 under 35 U.S.C. § 103(a) as unpatentable over Hartigan and one of Rios and Getchell is reversed.

The Examiner's decision to reject claims 6 and 7 under 35 U.S.C. § 103(a) as unpatentable over Hartigan and one of Ungari, Feather, and Pin-Houn Lin is reversed.

The Examiner's decision to reject claims 9, 12, and 13 under 35 U.S.C. § 103(a) as unpatentable over Hartigan and Rios is reversed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART